Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1364

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AQUATIC TECHNICAL SERVICES, INC.,
Petitioner,

v.

COUNTY OF NASSAU, NASSAU
COUNTY POLICE DEPARTMENT,
SAMUEL ROZZI, Commissioner
of Police, and FRANCIS T.
PURCELL, County Executive,
Respondents.

WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does this Court have jurisdiction to consider the questions raised in the Petition for Writ of Certiorari?

II. Are towing operations conducted by marine police officers in non-emergency situations performed in excess of valid police powers?

III. Do these towing operations infringe upon a private salvor's constitutionally protected liberty and property interests?

IV. Does marine police officer's unwarranted questioning of a private salvor in front of potential customers infringe the salvor's constitutionally protected liberty and property interests in his good name and reputation when these actions result in loss of business to the salvor?

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STATUTORY PROVISIONS INVOLVED

N.Y. Civ. Prac. Law § 5601 (McKinney 1978) provides in pertinent part:

> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
>
> 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

N.Y. Civ. Prac. Law § 5602 (McKinney 1978) provides:

> Appeals to the court of appeals by permission
>
> (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:
>
> 1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or
>
> (ii) from a final judgment of such court or final determination of such agency where

the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not

finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final

judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO CONSIDER THE QUESTIONS RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

In their Brief in Opposition the Respondents raise the question of whether this Court has jurisdiction under 28 U.S.C. § 1257(3) to consider the questions raised in the Petition for Writ of Certiorari. Their argument, essentially, is that the November 16, 1982, order of the Court of Appeals of New York (reprinted in the

Petition for Writ of Certiorari at A-27 through A-28) is not a final order of the state court system from which the Petitioners (hereinafter jointly referred to as "Rickard") may seek review. Yet the very decisions relied upon by the Respondents indicate that the November 16 order is, indeed, final.

This question is something of a mix of federal and state law. Certainly the ultimate decision, that is, the question of this Court's jurisdiction, is a federal question to be determined by this Court. Yet if state law would declare the November 16 order to be a non-final decree, this Court certainly would acknowledge that law. Curiously, the Respondents cite no state law authority for their argument other than the two civil practice laws, N.Y. Civ. Prac. Law §§ 5601 and 5602. These laws establish two methods by which an appeal

from the Appellate Division of the Supreme Court of the State of New York to the Court of Appeals of the State of New York may be had. First, under certain circumstances, such as where a question is raised under the United States Constitution, an appeal is permitted by right. N.Y. Civ. Prac. Law § 5601(b)(1). Second, under all other circumstances, the appellant must first receive permission to appeal. The Respondents appear to argue that where an appeal by right is denied, the order of the court of appeals denying this appeal is not final for the purpose of 28 U.S.C. § 1257(3) until the court of appeals further denies an appeal by permission. Neither the plain language of N.Y. Civ. Prac. Law §§ 5601 and 5602 nor case law from New York supports this conclusion.

Indeed, decisions from this Court do not support this conclusion. The two cases

arising from New York, decided by this Court, and relied upon by the Respondents support just the opposite conclusion. (See Brief in Opposition at 8)

In McMaster v. Gould, 276 U.S. 284 (1928), the original plaintiffs had appealed an interlocutory trial court order to the appellate division, which affirmed the order. Permission to appeal to the court of appeals was denied by the appellate division. The plaintiffs then appealed without permission to the court of appeals, which dismissed the appeal. This Court held that the plaintiffs' refusal to seek permission from the court of appeals after the appellate division denied the same meant that the appellate division's affirmance of the trial court decree was not a decree of the highest state court. Id. at 286-87. This Court recognized, however, that the state court appeal in McMaster

was a discretionary appeal, not an appeal by right. Id. at 286. In the present case, the final order of the court of appeals means that all federal constitutional questions before the state courts have been resolved and that a petition for review to this Court is ripe.

Essentially the same considerations came into play in Gotthilf v. Sills, 375 U.S. 79 (1963). There, the court of appeals dismissed its permission to appeal because the order appealed from did not finally determine the action, unlike the order from the appellate division in the present case. This Court noted that, because the order appealed from was not a final order, state law required permission of the appellate division for appeal to the court of appeals, and this was never applied for in Gotthilf. Id. at 80. In the present case, because a federal constitutional

question was raised, no permission was needed from the appellate division. N.Y. Civ. Prac. Law § 5601(b)(1).

Equally specious are the other decisions relied upon by the Respondents. Rickard here perfectly meets the test established by this Court in Minneapolis, St. Paul & Saulte Ste. Marie Railway v. Rock, 279 U.S. 410, 412 (1929), which is that this Court has jurisdiction to review federal questions when the highest state court affirms or denies the validity of the judgment of the lower state court. Accord Chesapeake & Ohio Railway v. Mihas, 280 U.S. 102, 103-04 (1929). In fact, the alternatives proposed by this Court in Matthews v. Huwe, 269 U.S. 262 (1925), perfectly describe the quandry Rickard would find himself in if he had followed the Respondents' suggestion and sought discretionary review from the New York Court of Appeals.

In Matthews, the state supreme court had dismissed an appeal of right because of the lack of a debatable federal question. The petitioners then sought review in this Court not from the state supreme court decree but from state intermediate court (the court of appeals) decree. This Court stated:

> The plaintiffs in error are thus in a dilemma from which they cannot escape. If the Supreme Court by final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the Superme Court. If it did not, then the decree of the Court of Appeals did not become that of the highest court to which a writ of error would lie from this court for lack of application for certiorari.

Id. at 266. Obviously, in the present case the court of last resort, the New

York Court of Appeals, "disposed of the constitutional questions on the merits by dismissal of the petition." Id. Thus, this Court may consider those questions.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975), Justice White, writing for the Court, acknowledged the general rule that review by this Court ordinarily is precluded where any issues remain for the state court to decide. In the present case, a decision by the court of appeals on state law grounds after a grant of discretionary review conceivably could moot the federal constitutional questions. But, Justice White continued, certain well-recognized exceptions have been carved out of this general rule. The first and fourth exceptions, that is, where the federal question is conclusive, id. at 479, and where federal policy might seriously be eroded, id. at 482-83, probably are not

applicable to the present case. Either the second or the third exception, though, certainly is applicable to the present case.

The second exception defined in Cox Broadcasting exists where the federal question will remain regardless of the outcome of future state court proceedings. Id. at 480. Assuming that the New York Court of Appeals would consider on discretionary review the federal issue it already has resolved on an appeal by right—an unlikely assumption—the federal question would remain such that one party or the other could seek review in this Court.

Far more important is the third Cox Broadcasting exception, that is, that this Court will review federal issues even though certain state questions may remain where later review of the federal question cannot be had no matter how the future

proceedings are resolved. Id. at 481. The court of appeals in the present case likely would have refused to reexamine the federal constitutional question it already had resolved had a discretionary appeal been sought. If that is so, the final decision of the court of appeals would have come long after the time had elapsed for review by this Court of the court of appeals' final decision. See 28 U.S.C. § 2101(c). Certainly a current review by this Court falls within the "pragmatic approach" this Court utilized in Cox Broadcasting to determine the question of finality. See 420 U.S. at 486. See also North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 162-63 (1973) (refusal of review would preclude further litigation on constitutional question).

This Court's "pragmatic approach" to the question of finality, 420 U.S. at 486, suggests that the November 16, 1982, order from the Court of Appeals of New York is a final order reviewable by this Court.

II. THE RESPONDENTS HAVE SUGGESTED NO REASONS WHY THE QUESTIONS RAISED IN THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE REVIEWED BY THIS COURT.

The Respondents appear to be arguing state law issues not presented to this Court. They never directly address the constitutional issues Rickard has raised. Furthermore, they misstate Rickard's position in several essential respects.

Rickard does not argue that government may not engage in private enterprise, but rather that government must find some authority other than the police power if it chooses to operate in the marketplace. (Compare Petition for Writ of

Certiorari at 16-18 with Brief in Opposition at 14) Rickard also does not argue that antitrust law is involved in the question before this Court. (See Brief in Opposition at 21-23)

In the final paragraphs of their Brief in Opposition the Respondents finally confront the issues raised by Rickard. Rickard suggests, however, that decisions such as Truax v. Raich, 239 U.S. 33 (1915), and LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F. Supp. 1370 (E.D. La. 1978), are much more pertinent to the question on appeal than are the decisions discussed by the Respondents. For this reason, Rickard requests that this Court set the present matter for plenary consideration by granting the requested writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant a writ of certiorari to the Court of Appeals of New York.

Respectfully submitted,

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